APPENDIX

Appendix

EXHIBIT "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 SEPTEMBER SESSION, 1968

Nos. 16813, 16814

JOHN O'C. FITZGERALD and CHARLES F. MARINO,
Petitioners-Appellants,

v.

LEE A. FREEMAN and RICHARD F. LEVY,
Intervenors-Appellees.

No. 16814

LEE A. FREEMAN and RICHARD F. LEVY,
Intervenors-Appellants,

v.

JOHN O'C. FITZGERALD and CHARLES F. MARINO,
Petitioners-Appellees.,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 25, 1969

Before KILEY, CUMMINGS and KERNER, *Circuit Judges.*

KILEY, *Circuit Judge.* This proceeding to enforce an attorney's lien under the Illinois Lien Act[1] involves a controversy between lawyers. The district court's judgment ordered the attorneys-intervenors to pay petitioners $17,500 as fees. Petitioners have appealed, and intervenors have cross-appealed, from the judgment. We affirm.

The proceeding before us arises from the case of *Radiant Burners, Inc.* v. *American Gas Assoc., Inc.,* 320 F.d 314 (7th Cir. 1963), and 273 F.2d 196 (7th Cir. 1959), *rev'd,* 364 U.S. 656 (1961), an anti-trust treble damage suit. The suit was begun in 1957 in the district court where defendant American Gas prevailed. This court affirmed, 273 F.2d 196 (1959), but the Supreme Court reversed, 364 U.S. 656 (1961). Subsequently the suit was settled and on October 1, 1965, by an agreed order, was dismissed.

Petitioners served their notice of lien on July 26, 1965. On November 5, 1965, with leave of court, they filed their verified petition to enforce the lien. Petitioners relied upon a contract between Radiant, and attorneys Keig and Neumark, and petitioner Fitzgerald, made December

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[1] Ill. Rev. Stat., Ch. 13 § 14 (1967), which provides in part: Attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or agreement, for a reasonable fee, for the services of collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action.

20, 1960, under which Radiant noted an earlier contract of employment of Keig and Neumark as its attorneys in the *American Gas* case, and expressed its desire to substitute other attorneys in the case and to settle the fees of "attorneys Keig, Neumark and Fitzgerald for the work done to date." Radiant agreed to pay Keig and Fitzgerald "11¼%, collectively" of whatever was recovered in the *American Gas* case by judgment or settlement and "22½% . . . of all moneys awarded by the Court as fees. . . ." Intervenors' answer asserted breach of the contract by Fitzgerald and denied any contract right of petitioner Marino, a lawyer employed in Fitzgerald's office, to fees.

The district court ordered intervenors to pay petitioners $17,500 which is $10,845.55 less than petitioners sought in the lien enforcement proceeding under the December, 1960, contract, and which is $17,500 more than intervenors contend petitioners should have, in view of their alleged breach. The court disallowed interest claimed by petitioners.

The district court's Memorandum discussed the various legal issues raised with respect to the December 20, 1960, contract and decided that since the controversy was between attorneys, the ordinary legal rules of contract should not alone be determinative, but there must also be compliance with the canons of professional ethics under the court's supervision over contingent attorneys' fees. The court considered the stipulation of facts signed by petitioners and intervenors, the pleadings and affidavits filed, the files of the district court and of this court in the *American Gas* case, and the relative contributions of petitioners and intervenors to the successful outcome of Radi-

ant's suit—all in the light of Canons 13 and 34 of the Code of Ethics.[2] The court's judgment was based on quantum meruit rather than upon the contract and thus rejected the "all or nothing" legal issue presented by the pleadings.

The record shows that petitioners performed services[3]

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[2] Canon 13, Contingent Fees

A contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

Canon 34, Division of Fees

No division of fees for legal service is proper, except with another lawyer, based upon a division of service or responsibility.

[3] 1. Preparation of (a) Complaint, Amended Complaint and Second Amended Complaint; (b) Briefs in opposition to AGA's Motion to Quash service of Summons and Affidavits in support thereof; (c) Briefs in opposition to Defendants' Motions to Dismiss Complaint, Amended Complaint and Second Amended Complaint; (d) Briefs filed in the United States Court of Appeals for the Seventh Circuit in connection with appeal from dismissal of Second Amended Complaint, as well as Petition for Rehearing; and (e) Petition for Writ of Certiorari filed in the Supreme Court of the United States.

2. (a) Research of applicable statutes and case law; (b) Discovery proceedings, including interrogatories addressed to various Defendants and depositions of employees of various Defendants; (c) Conferences with William P. Ayers, President of Radiant, at Fitzgerald's office, Ayer's home and Radiant's offices; (d) Personal appearances in Court in connection with Motions presented by either themselves or Defendant's attorneys; and (e) Oral argument in the United States Court of Appeals for the Seventh Circuit.

for Radiant from July 7, 1957, until June 6, 1960, when the Supreme Court granted certiorari. Thereafter both in successful argument before the Supreme Court and in achieving a settlement of the *American Gas* case for $450,000—from which $260,000 fees and expenses were paid to intervenors and attorney Neumark—intervenors performed legal services for Radiant.[4]

The parties agree that the district court possessed the power it applied in awarding the fees. Each party argues the power was not properly applied. The court was not required to find specifically, as petitioners contend, that the contingent fees provided in the December, 1960, contract were unreasonable. That finding is implicit in the decision. Nor can we say that the court ignored the December 20, 1960, contract. The memorandum decision states the contrary. Moreover, the argument by petitioners that the court did not make computations of time spent by petitioners in service of Radiant does not have merit since there is an indication petitioners did not keep time records and made no effort before the court to introduce records.

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[4] Preparation and filing of third amended complaint; discovery proceedings, including examination, copying, analysis and categorizing of documents, deposition proceedings and interrogatories; interviews with professional and other witnesses; preparation of and response to numerous motions relating to discovery; attendance at regularly scheduled pretrial conferences; legal research; preparation of briefs in connection with corporate attorney-client privilege; argument before the United States Court of Appeals for the Seventh Circuit; preparation of witnesses for depositions; and negotiations for and consummation of settlement.

This court's decision in *Brick* v. *Hirsch,* 331 F.2d 251 (7th Cir. 1964), is of no aid to petitioners. There the district court's decision did not involve Canon 13 and the court's supervisory power, but was based on resolving the credibility of witnesses on the vital question of the existence of the fee contract.

We see no need of prolonging this opinion to discuss points raised by intervenors, in their cross appeal. They are mainly arguments from the law of contracts. Suffice to say we have considered them and find them unpersuasive to overturn the district court judgment, upon the circumstances in this record. And we see no basis on the record for an imposition upon intervenors of the interest claimed by petitioners.

The judgment is AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

EXHIBIT "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RADIANT BURNERS, INC. an Illinois corporation,

Plaintiff,

vs.

AMERICAN GAS ASSOCIATION, INC., et al.,

Defendants,

JOHN O'C FITZGERALD and CHARLES F. MARINO,

Petitioners,

vs.

AMERICAN GAS ASSOCIATION, INC., et al.,

Respondents.

No. 57 C 1167

MEMORANDUM, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Campbell, C.J.—

Petitioners, John O'C Fitzgerald ('Fitzgerald') and Charles F. Marino ('Marino') have filed to enforce an attorneys lien. The lien relates to professional services rendered in the above captioned cause between 1957 and 1960 and arises from an agreement entered into by petitioners, and attorney Joseph Keig, Sr., with Radiant Burners, Inc. by its President, William P. Ayers. The Agree-

ment was assented to by attorney Lee A. Freeman ('Freeman') and Richard F. Levy ('Levy'), intervenors in this case.

Some brief background information is required for a complete understanding of this case. In 1957 Radiant Burners retained Joseph Keig, Sr. and Attorney Victor Neumark to prosecute its case against the American Gas Association. Keig, in turn, brought Fitzgerald into the case. Petitioner Marino worked in the office of Fitzgerald. All four filed their appearance. Keig, Neumark and Fitzgerald signed the pleadings and apparently, Fitzgerald and Marino did much of the work on the motions related to three complaints filed in the District Court and, after the complaint was dismissed by the District Court, prepared the briefs for the Seventh Circuit where Marino argued—unsuccessfully—the public injury question. Fitzgerald and Marino then prepared the successful petition for certiorari filed in the United States Supreme Court.

At this point Neumark brought in Levy who successfully argued the public injury question before the Supreme Court. (The extent to which Marino and Fitzgerald worked on the briefs filed in the Supreme Court is in dispute.) Shortly after the Supreme Court reversed the Court of Appeals on the public injury question, Freeman and Levy took over the case.

To accomplish the substitution of attorneys Radiant Burners entered into an agreement with Keig, Neumark and Fitzgerald dated December 20, 1960. By the terms of the agreement Radiant Burners agreed to pay Fitzgerald and Keig for work done by them an amount equal to 11¼% collectively of all monies, property and other things of value recovered or obtained by Radiant Burners by judgment, settlement, compromise or otherwise and 22½%

of all monies awarded by the court as fees due from defendants and to the plaintiffs' attorneys. (Since no fees were awarded by the court the 22½% provision is not in issue.) The agreement was assented by Freeman and Levy. Parenthetically, petitioner Marino was not a party to the agreement. Since he was employed by Fitzgerald, however, his efforts may properly be credited to Fitzgerald.

After this agreement was executed, Fitzgerald, Keig and Marino entered into their own agreement for the distribution of whatever amounts they might recover from their agreement with Radiant Burners. Fitzgerald and Keig were each to receive 45% of their total recovery, while Marino would receive 10%. Thus, petitioners claim that Fitzgerald is entitled to 5.0629% and Marino 1.1250% of all monies, property and other things of value recovered by Radiant Burners. Upon this background, Fitzgerald and Marino filed their petition.

The petition, answer, stipulation and affidavits and briefs filed herein raise considerable factual and legal questions relating to whether a valid contract was ever executed; whether it was breached; the effect of a release signed by Joseph Keig, Sr.; and the interpretation of a number of the terms of the agreement, including the amount in controversy.

The Agreement of December 20, 1960

Freeman and Levy, in their brief in opposition to the petition, argue that the agreement of December 20, 1960, giving rise to the claim was breached by petitioners at the outset and that it is of no force and effect. In support of this argument, Freeman and Levy claim that the terms of the agreement were based on the representations of

Keig and Fitzgerald that they possessed meaningful files and memoranda; that they had devoted time to the assignment and had maintained time records; and that they would execute withdrawals from the proceedings. They further allege that these representations were false. To support this argument they have filed an affidavit of the President of Radiant Burners, William P. Ayers. Ayers also states in his affidavit that he never retained Fitzgerald or Marino; that he had never consulted with Fitzgerald or Marino on any legal or factual matter involved; and that he knows of no services performed by Fitzgerald. To a certain extent, the sworn statement of Ayers is contradicted by the stipulation filed by the parties which sets forth the rather substantial services performed by Fitzgerald, Marino and Keig. (P. 4 and Ex. A) The stipulation also states that Fitzgerald and Keig turned over all of their files in this case. (PP. 6 and 7)

Fitzgerald and Marino filed affidavits stating that they performed substantial work on the case; that they had consulted with Ayers at Fitzgerald's office and at Ayers home; and, that Ayers read briefs filed under their names. Fitzgerald and Marino have also filed an affidavit of Keig, (who is, of course, not involved in this dispute) which states and represents that Marino and Fitzgerald consulted with Ayers at Fitzgerald's office and at Ayers' home and that Ayers read briefs bearing the names of Fitzgerald and Marino.

The Affidavits of Fitzgerald, Marino and Keig also deny that there were any representations that they had certain documents or that they had maintained time records. They further represent that they turned over any and all files, memoranda, etc., to Freeman and Levy and have completely complied with the terms of the agreement.

They state further that they did not withdraw from the case because to do so would have jeopardized their lien. (The agreement did not require petitioners to withdraw from the litigation).

The Release of Keig

On February 6, 1962, Keig executed an assignment and release of any interest he may have in professional fees from this case. The release also states that any work performed by Fitzgerald in connection with the case was performed at Keig's request and that Fitzgerald at no time was retained by Radiant Burners, and was not requested by Radiant Burners to render such services. (Stip. Ex. G) Thus, the intervenors argue, Fitzgerald and Marino were brought into the litigation by Keig, who has been fully compensated, and they must now look to Keig for any fees due them. (Keig assigned his claim for fees to Freeman and was paid $1,000 for the release.) (Stip. 13)

In his affidavit, previously referred to, Keig states that before executing the release he stated to Freeman that he was not releasing any claim of Fitzgerald or assigning any fees to which Fitzgerald was entitled.

There are also a number of other factual and legal disputes including the value of the recovery by Radiant Burners, Inc. from the case and the effect of a cancellation notice sent to Fitzgerald by Radiant Burners on March 8, 1961, advising Fitzgerald that it does not recognize his right to share in any portion of the proceeds of the case. Were the litigants laymen in a commercial enterprise, these questions might require resolution—as would the many questions suggested by the above recited facts. However, these litigants are members of a calling over which this court has supervisory responsibilities and powers and

whose business dealings are not limited to the ordinary rules of contracts, but must also comply with the canons of professional ethics.

Even assuming that a valid contract existed between Keig, Fitzgerald and Radiant Burners which effected the substitution of intervenors Levy and Freeman, still I shall not enforce a lien arising from the agreement should it be in anyway inconsistent with the canons of professional ethics. I am concerned here with two of said Canons:

> Canon 34, Division of Fees
>
> No division of fees for legal service is proper, except with another lawyer, based upon a division of service or responsibility.
>
> Canon 13, Contingent Fees
>
> A contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

In observance of these Canons, I am more concerned with the value of services or responsibilities which have been contributed to the successful completion of this cause, then with the specific terms of an agreement.

The stipulation filed herein sets forth the extent Attorneys Freeman, Levy and Neumark have been compensated for their services. As to the value of the services rendered by all parties, I am fully aware of the proceedings which took place before me and which were handled almost exclusively by intervenors Freeman and Levy. I have carefully reviewed the stipulation of the parties relating to the services performed by petitioners as well as the full file of this court and the Court of Appeals. I am also fully

aware of the initial risk and uncertainty of compensation in this case, and of the nature and value of the recovery in question and the extent that all attorneys of record contributed to the realization of that recovery.

Based on these facts and considerations, and in furtherance of my responsibility to supervise the reasonableness of the fees in this case, the court sets attorneys fees for petitioner, Fitzgerald, in the amount of $17,500, without interest. Petitioner Marino is to be compensated by Fitzgerald in accordance with the terms of their agreement.

It is further ordered that the above sum is to be paid to petitioner by each of the attorneys who have received compensation from respondent, Radiant Burners, Inc., i.e., Freeman, Levy and Neumark, in direct proportion to the compensation received by each of them.

/s/ William J. Campbell
Chief Judge

Dated: Feb. 21, 1967.

EXHIBIT "C"

AGREEMENT

THIS AGREEMENT entered into this 20th day of December, 1960, between JOSEPH KEIG, SR. (herein called "Keig"), JOHN O'C. FITZGERALD (herein called "Fitzgerald") and VICTOR NEUMARK (herein called "Neumark"), hereinafter referred to as the attorneys, and RADIANT BURNERS, INC. (hereinafter sometimes referred to as the "Client");

WHEREAS, Neumark and Keig have heretofore entered into a contract of employment as attorneys at law for RADIANT BURNERS, INC. in respect of an Anti-Trust law suit, Radiant Burners, Inc. v. American Gas Association, et al., which was heretofore filed in the United States District Court of the Northern District of Illinois, No. 57 C 1167, now pending as Case No. 73, October Term, 1960, in the United States Supreme Court for determination; and

WHEREAS, the Client desires to substitute other attorneys for the attorneys, Keig and Neumark, and FitzGerald, who was brought into the litigation by Keig, and also desires to settle the fees of the attorneys, Keig, Neumark and FitzGerald for work done to date;

NOW, THEREFORE, it is agreed by and between the parties hereto:

1. That all contracts heretofore existing between the parties in respect of the employment of the attorneys by RADIANT BURNERS, INC. are hereby declared to be terminated and void;

2. The Client agrees to pay for work heretofore completed by them as follows. Keig and FitzGerald, an amount

equal to eleven and one-fourth per cent (11¼%) collectively, of all moneys, property, and other things of value recovered or obtained by RADIANT BURNERS, INC. by judgment, settlement, compromise or otherwise, and Neumark, eight and three-fourths per cent (8¾%) of all moneys, property and other things of value recovered or obtained by RADIANT BURNERS, INC. by judgment, settlement, compromise or otherwise. Keig and FitzGerald, collectively, shall be paid twenty-two and one-half per cent (22½%) and Neumark seventeen and one-half per cent (17½%) of all moneys awarded by the Court as fees due from the defendants, or any of them, to the attorneys for the plaintiff or such attorneys in respect of the payment of reasonable attorneys fees;

3. Attorneys agree that they will within the next six (6) weeks submit to the Client a statement of all time expended by them to date in connection with the case, and that they will cooperate with the Client and its new attorney in presenting to the Court any claim which may be asserted as and for attorneys' fees; attorneys, however, shall not be obliged to perform any future services on this case;

4. Attorneys expressly release any and all claims which they have against RADIANT BURNERS, INC. except those provided in this Agreement, and RADIANT BURNERS, INC. hereby expressly releases any and all claims which it has against any of the attorneys (except those provided for in this Agreement);

5. The Client agrees that it will neither perform or omit to perform any act which will deprive the attorneys of their rights herein granted, and further agrees that the fees herein granted to the attorneys shall constitute a lien upon any and all recovery received from the client, whether in satisfaction of judgment, settlement or compromise;

6. Unless the Client shall have retained Richard Levy and Lee Freeman, collectively, in writing, as an attorney for the plaintiff, RADIANT BURNERS, INC., in the case of Radiant Burners, Inc. v. American Gas Association et al, now pending in the United States Supreme Court as Case No. 73, October Term, 1960, within thirty (30) days, this Agreement shall terminate and the previous agreement between JOSEPH KEIG, SR. and VICTOR NEUMARK on the one hand, and RADIANT BURNERS, INC. will be revived and remain in full force as the only agreement between the parties hereto.

/s/ *Joseph Keig, Sr.*
Joseph Keig, Sr.
/s/ *John O'C. FitzGerald*
John O'C. FitzGerald
/s/ *Victor Neumark*
Victor Neumark
ATTORNEYS
RADIANT BURNERS, INC.
By /s/ *William P. Ayers*
as its President

(SEAL)
Attested by:
/s/ *Alice F. Ayers*
as its Secretary

I hereby personally assent to the provisions of the foregoing agreement.

/s/ *Willidm P. Ayers*
William P. Ayers

(We) I have read the foregoing Agreement and assent thereto.

/s/ *R. F. Levy*
/s/ *Lee A. Freeman*
NEW ATTORNEYS.

EXHIBIT "D"

AMERICAN BAR ASSOCIATION
Standing Committee on Professional Ethics
Re: Informal Opinion No. 870 - 8/4/65
Division of Fees

We have received from you the following letter requesting an answer to the question set forth in your letter:

"Rule No. 34 of the Canons of Professional Ethics of the American Bar Association provides that fees shall be divided between attorneys based on the division of work between all attorneys who participate.

"In September, 1963, at a time when this Canon had not been called to our attention, one of the men in our firm made an arrangement with an attorney in a nearby community in connection with the division of fees in a case now pending in our office. The fees were to be divided on the basis of one-third to him as the 'forwarding attorney' and two-thirds to our firm. We have every reason to believe that our office is about to bring this case to a successful and satisfactory conclusion. The amount of the fee will be $40,000.00, or very close thereto.

"The clients are very much opposed that the original attorney receive any compensation, excepting on a quantum meruit basis. They explain that the reason that they consulted us was that they had been dissatisfied with the original attorney.

"'Original' attorney did very little work on the case—no more than 2%, if that.

"I am enclosing a copy of the letter regarding the division of fee written by a member of our firm, blanking out the name of the attorney to whom the letter was sent. (Enclosure reads as follows: This will confirm our discussion of today that our fee arrangement with Mr. and Mrs. "A" and Mr. and Mrs. "B" is 33⅓% of any settlement prior to suit, and 40% of any recovery after the institution of suit. The division of fees between our offices is to be one-third of the total fees to you and two-thirds to this office.)

"The question that we ask of you: Is our firm bound to honor the agreement in this letter, or is it proper, even at this date, and in spite of this letter, to ask an impartial group to evaluate the percentage of work done by the individual attorney and the amount of work done by our firm, and to divide the fees on that basis?"

When the late Henry S. Drinker, a former chairman of this Committee, wrote his authoritative work on *Legal Ethics*, he devoted an entire section of his book to the subject "The Lawyer's Obligations and Relations to Other Lawyers". The following are quotations from that work:

> "A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court."-(Pg. 194)

"A very great part of a man's comfort, as well as of his success at the Bar, depends upon his relations with his professional brethren. With them he is in daily necessary intercourse, and he must have their respect and confidence, if he wishes to sail along in smooth waters. He cannot be too particular in keeping faithfully and liberally every promise or engagement he may make with them." (Pg. 194)

"A lawyer may not repudiate an oral stipulation, made in return for a favor granted, which cannot be revoked, to admit a certain fact in issue, which at the time could have been proved but now can be, if at all, only with difficulty; this despite his client's insistence and the existence of a court rule making oral stipulations unenforceable.

"A lawyer must also observe the customs of the bar as well as the confidences of another lawyer, although indiscreetly given and improperly received, and although this may entail his withdrawing from the case." (Pg. 194-5)

It is the decision of the Committee that the attorney should not interpose as a reason for not carrying out the agreement he made that the agreement was not ethical. This matter of ethics should have been recognized and adhered to by the attorneys before they entered into the agreement. When two lawyers have participated in an unethical agreement one of them should not, where no one else is involved, set up the unethical agreement against the other.